United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1901.

No. 1041.

56

No. 5, SPECIAL CALENDAR.

THE UNITED STATES OF AMERICA *EX REL.* CHARLES W. STAPLETON, APPELLANT,

vs.

CHARLES H. DUELL, COMMISSIONER OF PATENTS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 28, 1900.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1900.

In the Court of Appeals of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* CHARLES W. Stapleton, Appellant,
vs.
CHARLES H. DUELL, Commissioner of Patents.
} No. 1041.

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a Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* Charles W. Stapleton
vs.
CHARLES H. DUELL, Commissioner of Patents.
} No. 44246. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for Writ of Mandamus.*

Filed October 27, 1900.

Supreme Court, District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* Charles W. Stapleton, Relator,
against
CHARLES H. DUELL, Commissioner of Patents, Respondent.
} No. 44246. At Law.

The above-namad relator respectfully shows to this honorable court as follows:

1. That he is a citizen of the United States of America and a resident of the city and State of New York.

2. That the respondent is the Commissioner of Patents of the United States of America, duly qualified and acting as such, and was such Commissioner and acting as such at the time of the occurrences hereinafter mentioned and set forth.

3. Your relator further shows that on June 23rd, 1899, he filed in the Patent Office of the United States of America an application for a patent for an "improvement in rubber vehicle tires;" that an

interference was subsequently declared between the relator and Frank W. Kinney on said application, and on a hearing before the examiner of interferences said Kinney was awarded priority of invention, from which decision your relator appealed to the
2. board of examiners-in-chief, which said board reversed the decision of the examiner of interferences and awarded priority of invention to your relator; that from this decision of the board of examiners-in-chief said Kinney appealed to the Commissioner of Patents in person, and a hearing on said last-named appeal was had Sept. 28th, 1900.

4. That said appeal was not heard or determined by the Commissioner of Patents in person, nor did said Commissioner make or sign any decision therein, but the Assistant Commissioner of Patents did hear and determine said appeal and make and sign the decision therein.

5. The relator alleges and states the facts to be that at the beginning of and during much, if not all, of said argument and the hearing of said appeal the Commissioner of Patents, Mr. Charles H. Duell, was present in person at the Patent Office, in his regular apartments, attending to the regular and official duties of his office, and was within a room adjoining or contiguous to that where said appeal was heard both at the beginning of and during the greater part, if not all, of the hearing.

6. That on the hearing of said appeal the relator was represented by counsel, who argued the appeal, but that said counsel did not know and was wholly unaware of the presence and attendance of said Commissioner of Patents at his office, as aforesaid, until after the argument before said Assistant Commissioner had begun and had proceeded at some length, and that the first intimation that the Assistant Commissioner and not the Commissioner in person was to hear said appeal was about five minutes before the time set for the hearing to begin, when counsel for said Kinney informed the
3 relator and his counsel of the fact.

7. That upon learning that said Commissioner of Patents was not absent from his office at the time of the hearing of said appeal your relator at once took measures to have said hearing before said Assistant Commissioner set aside as irregular, and made an application to the Commissioner for that purpose, founded upon an affidavit and notice of motion, copies of which were served upon counsel for said Kinney and are also hereto annexed, marked, respectively, "A and B," and are made a part of this affidavit; that the papers on the application to set aside said hearing were deposited in the post-office in the city of New York, with the postage fully paid thereon, on the 4th day of October, 1900, addressed to the Commissioner of Patents at Washington, D. C., and the relator believes it reached said Commissioner or his office on the morning of October 5th, 1900; that on the 6th day of October, 1900, relator's counsel received a copy of a decision on said appeal signed by the Assistant Commissioner, which decision, though dated Oct. 3rd, 1900, was contained in an envelope postmarked "Washington, D. C., Oct. 5, 1900, 5 p. m.;"

that the papers used on the motion to set aside said hearing were prepared and the affidavit verified on Oct. 2nd, 1900.

8. That the motion made by your relator before the Commissioner to have the proceedings herein mentioned set aside was denied by the Commissioner of Patents on Oct. 26th, 1900, and such decision denying said motion has been duly filed in said Commissioner's office, and said Commissioner has refused and now refuses to con-
4 sider, hear, or determine said appeal.

9. Your relator further avers that he is informed and believes that said Assistant Commissioner had no power, authority, or jurisdiction to hear or act on said appeal, or to determine the same, or to make or sign any decision therein, for the reason that the Commissioner of Patents in person was present at his regular office, attending to the business of his office, at the beginning of and during the argument or hearing, and that the decision so made by the Assistant Commissioner is irregular and void.

Wherefore your relator prays that a writ of mandamus issue herein, directed to said Charles H. Duell, Commissioner of Patents, commanding him to set aside as irregular and void the decision made by said Assistant Commissioner in said interference proceedings, and that said Commissioner proceed to hear and determine said appeal in person, the same as though it had not been heard and decided by said Assistant Commissioner, and that he fix a date for such hearing giving the respective parties due notice thereof.

2. That the relator's time for appealing from the decision of said Assistant Commissioner be extended until after the hearing and final determination of this application.

3. For such other and further relief as to the court may seem proper.

Dated October 12, 1900.

CHARLES W. STAPLETON.

5 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Charles W. Stapleton, being duly sworn, says that he is the relator herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHARLES W. STAPLETON.

Subscribed and sworn to before me this 12th day of October, 1900.

LEON LASKI,
[SEAL.] *Notary Public, N. Y. Co.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Garry P. Van Wye, being duly sworn, says that he was attorney for the relator in the interference proceedings described in the fore-

going petition; that he has read the foregoing petition; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

GARRY P. VAN WYE.

Subscribed and sworn to before me this 12th day of October, 1900.

LEON LASKI,
Notary Public, N. Y. Co.

[SEAL.]

6 "EXHIBIT A."

Filed October 27, 1900.

Motion.

In the United States Patent Office.

In re Interference
C. W. STAPLETON
v.
F. W. KINNEY.
} Intf. No. 20229.

Elastic tires for vehicles. On appeal to the Commissioner.

To the Commissioner of Patents:

On the annexed affidavit of Garry P. Van Wye and on all the papers in this case, Charles W. Stapleton, one of the above-named contestants, hereby moves that the hearing in the case by the Assistant Commissioner of Patents on the 28th day of September, 1900, be set aside and disregarded on the grounds that the Assistant Commissioner had no power to hear an interference case which had been appealed to the Commissioner "in person" from the board of examiners-in-chief, when the Commissioner was present in the Patent Office, attending to the regular duties of his office, and that the decision of the Assistant Commissioner will not be binding upon either party to this interference, and that a new date of hearing be fixed.

A hearing of this motion is desired on the 12th day of Oc-
7 tober, 1900, or as soon thereafter as the Commissioner may direct.

Dated New York, Oct. 2, 1900.

CHARLES W. STAPLETON,
By GARRY P. VAN WYE,
His Attorney.

Received notice and copy of above motion and accompanying affidavit this 4th day of October, 1900.

PIERCE & FISHER,
Attorneys for F. W. Kinney.

8 "EXHIBIT B."

Filed October 27, 1900.

In the United States Patent Office.

In re Interference of
CHARLES W. STAPLETON
vs.
FRANK W. KINNEY. } Interference No. 20229.

Subject: Elastic vehicle tires.

STATE OF NEW YORK,
City and County of New York, } *ss:*

1. Garry P. Van Wye, being duly sworn, says that he resides in the city of New York and is the attorney of record for the contestant herein, Charles W. Stapleton.

2. That the subject of the interference is elastic tires for vehicles, being interference No. 20229, between Charles W. Stapleton and Frank W. Kinney.

3. That in due and regular course of these proceedings the board of examiners-in-chief, on the 5th day of July, 1900, made and filed its decision, awarding priority of invention to said Chas. W. Stapleton; that an appeal was taken by said Kinney from said decision of the board of examiners to the Commissioner of Patents in person, and the date for hearing fixed for Sept. 19th, 1900; that on the request of counsel for said Kinney the date for the hearing was afterwards changed to Sept. 28th, 1900.

4. That on Sept. 28th, 1900, deponent attended at the Patent Office,
9 in Washington, to argue said appeal, and about five minutes before the time set for the hearing was greatly surprised to learn, as he did, from counsel for Mr. Kinney that the appeal was to be heard by the Assistant Commissioner, and not by the Commissioner in person; that deponent almost immediately after receiving this information repaired to the room where said appeal was to be heard, and there found presiding the Assistant Commissioner, who there and then heard said appeal.

5. Deponent further states that he is now informed and knows the fact to be that at the beginning of and during said argument of said appeal that the Commissioner of Patents was present in person at his regular apartments in said Patent Office, engaged in the regular discharge of the duties of his office, and which apartments are adjacent to the room in which the appeal was heard by said Assistant Commissioner.

6. That deponent did not know of the presence of said Commissioner at his regular office until after the argument of said appeal had proceeded at some length, and in consequence thereof deponent's client has been deprived of his right of having said appeal heard by the Commissioner of Patents in person.

GARRY P. VAN WYE.

Subscribed and sworn to before me this 2nd day of October, 1900.

LEON LASKI,

[SEAL.] *Notary Public, New York County.*

10 *Rule to Show Cause.*

Filed October 27, 1900.

Supreme Court of the District of Columbia:

THE UNITED STATES OF AMERICA *ex Rel.* Charles W. Stapleton *vs.* CHARLES H. DUELL, Commissioner of Patents. } At Law. No. 44246.

Upon consideration of the petition filed in above-entitled cause for the writ of mandamus and upon consideration thereof it is, this 27th day of October, 1900, ordered that the respondent named therein show cause on or before Friday, the second day of November, 1900, at 10 o'clock a. m., before me, why the said writ of mandamus should not issue as prayed in said petition, provided that a copy of this order be served on the said Charles H. Duell on or before Tuesday, the 30th day of October, 1900.

A. C. BRADLEY, *Justice.*

Marshal's Return.

Served copy of within rule on Charles H. Duell, Commissioner of Patents, October 30, 1900.

AULICK PALMER, *Marshal.*

11 *Respondent's Answer.*

Filed November 2, 1900.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* Charles W. Stapleton, Relator, *vs.* CHARLES H. DUELL, Commissioner of Patents, Respondent. } At Law. No. 44246.

The respondent, Charles H. Duell, Commissioner of Patents, respectfully makes return to the order of the honorable the supreme court of the District of Columbia, issued in the above-entitled case, directing him to show cause why a writ of mandamus should not issue against him compelling him to hear and determine in person an appeal taken in a certain interference proceeding in the Patent Office from the decision of the examiners-in-chief to the Commissioner of Patents, as prayed for by the petitioner.

First. As to the averments in the first, second, and third paragraphs of the petition, the respondent admits them to be true.

Second. As to the averments in the fourth paragraph, respondent states that the records of his office show that an appeal was taken from the decision of the examiners-in-chief to the Commissioner of Patents by Kinney, one of the parties to the interference of Stapleton *v.* Kinney; that said appeal was set for hearing at eleven
12 o'clock a. m., September 28, 1900; that he, being occupied with other official matters, assigned the said appeal to the Assistant Commissioner of Patents for hearing; that said appeal was heard and determined by the Assistant Commissioner of Patents, who made and signed a decision in the case on October 3, 1900.

Third. As to the statements in the fifth paragraph of relator's petition, respondent admits them to be true.

Fourth. As to the averments in the sixth paragraph of relator's petition, respondent states that he has no knowledge of the truth or falsity thereof, other than as will appear from the record, and in this connection reference is made to the second paragraph of the affidavit of George P. Fisher, Jr., marked "A" and attached to and made a part of this answer.

Fifth. As to the allegations in the seventh and eighth paragraphs of relator's petition, respondent admits that on October 5, 1900, two days after the Assistant Commissioner's decision was made and filed and one day after the date of the notice to the parties, the relator filed in the Patent Office a motion praying that the hearing of the case by the Assistant Commissioner on the 28th day of September, 1900, be set aside and disregarded on the ground that the Assistant Commissioner had no right to hear an interference case which had been appealed to the Commissioner in person from the examiners-in-chief when the Commissioner was present in the Patent Office, attending to the regular duties of his office, and that the decision of the Assistant Commissioner would not be binding upon either party to the interference, and that a new date of hearing should be
13 fixed; that the motion and its accompanying affidavit on file in the Patent Office are dated October 2, 1900, and that on October 6, 1900 (not 26, as stated in the copy of the relator's petition furnished to respondent), he refused to grant the motion.

Sixth. To the matter in the ninth paragraph of relator's petition respondent states that the provision of the statute, act of March 2, 1861, section 2, 12 Statutes at Large, 246, which provides for "an appeal to the Commissioner in person," is found in the law long prior to the creation of the office of Assistant Commissioner of Patents; that the office of Assistant Commissioner of Patents was created by the act of July 6, 1870, section 476, Revised Statutes; that the purpose of the act in creating the office of Assistant Commissioner of Patents was to provide an officer to assist or share the duties of the Commissioner of Patents; that a part of the duties of the Commissioner of Patents is to hear and determine appeals from the examiners-in-chief; that for many years Congress in making appropriation for the Patent Office has recognized the functions of the Assistant Commissioner by expressly stating that he "shall perform such duties pertaining to the office of the Commissioner as may be

assigned to him by the Commissioner;" that it has been the uniform practice or custom of the Patent Office since the office of Assistant Commissioner of Patents was created for the Assistant Commissioner to hear and determine such appeals as were assigned to him for that purpose by the Commissioner, whether the Commissioner was present in his office or not, and that the Commissioners have refused to hear and decide again cases that have been regularly
14 referred to and decided by the Assistant Commissioner.

Wherefore your respondent prays the judgment of this honorable court whether the facts of the case contained in the record and the law show a right in the relator to have a writ of mandamus in his behalf as prayed, and that the relator be hence dismissed:

CHARLES H. DUELL,
The Commissioner of Patents, Respondent,
By W. A. MEGRATH,
His Attorney.

"EXHIBIT A."

Filed November 2, 1900.

United States Patent Office.

CHARLES W. STAPLETON
vs.
FRANK W. KINNEY. } Interference No. 20225.

Elastic tires for vehicles. On appeal to the Commissioner.

Reply to Stapleton's motion to set aside the hearing had before the Assistant Commissioner on the 28th day of September, A. D. 1900.

STATE OF ILLINOIS,
County of Cook, } *ss:*

George P. Fisher, Jr., being duly sworn, deposes and says as follows:

15 1. That he is a member of the firm of Pierce & Fisher, attorneys for Frank W. Kinney.

2. That about half past ten o'clock on the morning of September 28, 1900, he entered the room of the clerk in charge of the interference records of the Patent Office and there found Mr. Charles W. Stapleton and his attorney, Mr. Garry P. Van Wye; that shortly thereafter one of the clerks in said room informed affiant that the appeal of this interference would be heard by the Assistant Commissioner of Patents, and that thereupon affiant walked over to Messrs. Stapleton and Van Wye and stated to them that he had been so informed; that within a few minutes thereafter affiant saw said Stapleton leave said room and go in the direction of the room occupied by the Commissioner of Patents; that at eleven o'clock affiant and Mr. Van Wye entered the room of the Assistant Commissioner of Patents and within a few minutes thereafter Mr. Stapleton appeared at the door opening from the Commissioner's room, in

conversation with the Commissioner, and at once took a seat at the side of Mr. Van Wye. Affiant does not recall whether or not he (affiant) had at such time begun his opening argument, but if so he had certainly not proceeded therewith more than five minutes; that affiant occupied from about eleven o'clock until the noon recess in his opening, and that immediately after said recess Mr. Van Wye began his argument, which, with the affiant's reply thereto, occupied the greater part of the afternoon; that no protest or objection whatever was at any time expressed by either Mr. Van Wye or Mr. Stapleton in affiant's presence as to the authority of the Assistant Commissioner of Patents to hear said appeal or as to the propriety of his doing so.

16 III. Affiant further says that the record in this case shows that Mr. Stapleton is a lawyer of large experience in patent matters; that he conducted the examination and cross-examination of witnesses in this case and, as he informed affiant, prepared a large part of the printed brief upon this appeal, and affiant submits that if any objection existed in the mind of Mr. Stapleton or of his attorney, Mr. Van Wye, to the hearing of this appeal by the Assistant Commissioner of Patents, such objection should have been expressed before the hearing or certainly should have been expressed at the beginning of affiant's opening argument, when the Commissioner of Patents himself appeared at the door of the Assistant Commissioner's room, and when Mr. Van Wye must have been advised of the Commissioner's presence in the Patent Office.

4. Affiant submits that for the Patent Office to permit attorneys to argue appeals before the Assistant Commissioner and then grant new hearings before the Commissioner, at the whim of the parties, would be a flagrant travesty upon judicial procedure, and when, as in this case, the attorney for one of the parties must attend from a long distance the expense incident to a new hearing would work a most serious hardship.

5. That the provision of the statute under which this "appeal to the Commissioner in person" was taken was found in the law (act of 1861, chapter 88) long prior to the creation of the office of Assistant Commissioner of Patents, and at a time when such words were intended to afford an appeal to the Commissioner from such

17 subordinate officers as dealt with the appealable matters in the first instance; that the purpose of the statute in creating the office of Assistant Commissioner of Patents was to provide an officer who might assist with or share in the duties of the Commissioner; that a very large part of the duties of the Commissioner are the hearings of appeals, and the plain intent of the law in creating the office of Assistant Commissioner of Patents being to provide some one who might assist the Commissioner in his most arduous work, manifestly the purpose of the law would be defeated if the Assistant Commissioner be not allowed to share with the Commissioner in that class of cases which comprise the major part of his duties; that for many years Congress in its appropriations acts has recognized the function of the Assistant Commissioner by expressly providing in the

appropriation for his salary that he "shall perform such duties pertaining to the office of Commissioner as may be assigned to him by the Commissioner;" that affiant submits, therefore, that under the law it was entirely right and proper for the Assistant Commissioner of Patents to hear this appeal, as it is right and proper for him to perform any other like duty that may be assigned to him by the Commissioner. (See *Ex parte* Hughes, 56 O. G., 1448; also Hicy *v.* Peters, 76 O. G., 333.)

In conclusion, affiant submits that the decision rendered by the Assistant Commissioner of Patents under date of October 3, 1900, is binding upon the parties hereto and should not be set aside.

GEORGE P. FISHER, JR.

Subscribed and sworn to before me this 9th day of October, A. D. 1900.

[SEAL.] ALBERTA ADAMICK,
Notary Public, Cook County, Illinois.

18 Supreme Court of the District of Columbia, Saturday, November 24, 1900.

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

THE UNITED STATES OF AMERICA *ex Rel.* Charles W. Stapleton, Relator,
vs.
CHARLES H. DUELL, Commissioner of Patents, Respondent.
} At Law. No. 44246.

This cause came on to be heard upon the petition for writ of mandamus, the rule to show cause issued thereon, and the answer of respondent, and was argued by counsel and submitted to the court. It is thereupon, this 24th day of November, 1900, by the court and the authority thereof, adjudged and ordered that the prayer of the petition be, and it is hereby, denied, the rule to show cause issued thereon discharged, and the said petition dismissed at the costs of the relator.

Opinion of Justice Bradley.

Filed November 24, 1900.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Rel.* CHARLES W. Stapleton
vs.
CHARLES H. DUELL, Commissioner of Patents.
} At Law. No. 44246.

19 This is an application for a writ of *mandamus* directing the respondent, The Commissioner of Patents, to hear and

decide an appeal. A rule to show cause was issued upon filing the petition; to which rule the respondent has made due answer.

It appears from the petition and the answer that the relator is a party to an interference proceeding pending in the Patent Office in which the board of examiners-in-chief awarded priority of invention to relator; that from that decision an appeal was taken by the adverse party to the Commissioner of Patents in person; that on the day set for hearing the appeal the Commissioner assigned the appeal to the Assistant Commissioner of Patents for hearing; that the appeal was heard by the Assistant Commissioner, the relator being present personally and by counsel, and the decision was made and signed by the Assistant Commissioner; that two days later the relator filed in the Patent Office a motion praying that the decision of the Assistant Commissioner be set aside and disregarded, on the ground that he had no lawful authority to hear and determine the appeal, which motion the Commissioner refused to grant; that at the time of the hearing by the Assistant Commissioner the Commissioner was present in an adjoining room, engaged in other official matters.

The respondent alleges that "the office of Assistant Commissioner was created by the act of July 8, 1870, sec. 476, Rev. Statutes; that the purpose of the act in creating the office of Assistant Commissioner of Patents was to provide an officer to assist or share the duties of the Commissioner of Patents; that a part of the duties of the Commissioner of Patents is to hear appeals from the examiners-in-chief; that for many years Congress in making appropriation for the Patent Office has recognized the functions of the Assistant Commissioner by expressly stating that he shall perform such duties pertaining to the office of the Commissioner as may be assigned to him by the Commissioner; that it has been the uniform practice or custom of the Patent Office since the office of Assistant Commissioner of Patents was created for the Assistant Commissioner to hear and determine such appeals as were assigned to him for that purpose by the Commissioner, whether the Commissioner was present in his office or not, and that the Commissioners have refused to hear and decide again cases that have been regularly referred to and decided by the Assistant Commissioner," and he denies that it is his duty under the circumstances to hear or determine the said appeal.

The office of Assistant Commissioner of Patents was created by act of Congress, July 8, 1870, 16 Stat., 220, and his duties were thus defined: "In case of the death, resignation, absence or sickness of the Commissioner his duties shall devolve upon the Assistant Commissioner until a successor be appointed or such absence or sickness shall cease." The substance of this statute is embodied in the Revised Statutes of the United States, but this provision as to the duties and authority of the Assistant Commissioner was omitted. Although it is probable that the omission was an inadvertence, yet by sec. 5596 such omission operated as a repeal of the provision. It does not appear that this omission has been supplied by any subse-

quent legislation. The act of Congress of July 11, 1890, making appropriations for the legislative, executive, and judicial expenses
21 of the Government, contains this item under the subject United States Patent Office: "Assistant Commissioner who shall perform such duties pertaining to the office of Commissioner as may be assigned to him by the Commissioner, three thousand dollars," 26 Stat., 259, and such item is repeated verbatim in every subsequent annual appropriation act.

From the date of the approval of the Revised Statutes, June 22, 1874, until July 11, 1890, the Assistant Commissioner of Patents appears to have been without statutory power and to have been charged with no statutory duty. Since July 11, 1890, he has been annually clothed with the power and duty to perform such duties pertaining to the office of the Commissioner of Patents as that officer may assign to him. The relator contends that under the act of 1870 the authority of the Assistant Commissioner to perform any of the duties of the Commissioner was expressly limited to the occasions mentioned, viz., the death, resignation, absence, or sickness of the Commissioner; that no power was given to perform any of his functions when he was present. He also contends that the recited provision contained in the annual appropriation bills does not confer specific power upon the Commissioner to delegate any of his discretionary or judicial functions to the Assistant Commissioner or authorize the Assistant Commissioner to exercise such functions, and it must be construed to relate only to the administrative duties of the Commissioner. He also contends that the duty of the Commissioner to hear and determine appeals in interference cases is a personal, judicial duty which the Commissioner cannot delegate in the absence of such express statutory authority.

22 The contention of the relator that the action of the Commissioner in hearing and deciding appeals is judicial in its nature cannot be successfully controverted. Comm'r of Patents *v.* Whitely, 4 Wall., 522; Butterworth *v.* Hoe, 112 U. S., 50, 67. It is equally correct as a legal proposition that judicial functions cannot be delegated in the absence of statutory authorization. The cases in support of this proposition are numerous. Two cases may be cited in which the principle has been applied to the duty of the President to review, for the purpose of confirming or disapproving, the proceedings of a court-martial which in time of peace sentenced a commissioned officer to dismissal from the service.

Runkle *v.* U. S., 122 U. S., 543.
U. S. *v.* Page, 137 U. S., 673.

In the Runkle case, Chief Justice Waite, delivering the opinion of the court, says: "The action of the President is judicial in its character, not administrative. * * * He is, himself, to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate."

The respondent says that Congress intended to confer the requisite authority to delegate the power to the Assistant Commissioner to hear and determine specified appeals from time to time, and by the

act of July 11, 1890, and by the annual reiteration of the provisions that he and his predecessors in office have construed it as giving such authority, and that the practice in the Patent Office under such construction has been uniform for ten years. Congress has
23 not interfered with it. Inasmuch as the statute failed to specify the duties pertaining to the office of the Commissioner that might be assigned by him to the Assistant Commissioner, it became the duty of the Commissioner as the head of the office, in the due administration of its affairs, to determine what his authority was in the premises. His construction of the statute would not be binding upon the court if the statute should properly come before it for interpretation, but such construction acted upon for a number of years would be entitled to great respect, and might be controlling.

U. S. *v.* Ala. S. R. R., 142 U. S., 615.
U. S. *v.* Hill, 120 U. S., 169.
U. S. *v.* Union Pac. R. R., 148 U. S., 562.
U. S. *v.* Philbrick, 120 U. S., 52.

As Justice Fields remarks, in Robertson *v.* Downing, 127 U. S., 607, "the regulation of a department of the Government is not, of course, to control the construction of an act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent reasons."

It is a plain statutory duty of the Commissioner to hear and determine a matter regularly appealed to him under the statutes, the rules of practice being complied with, and, upon his arbitrary refusal so to do, he might be compelled to act by *mandamus*. In this case, however, he says that he declines to hear the appeal because it was regularly assigned for hearing by him to the Assistant Com-
24 missioner, who has heard and decided it in conformity to law and the established practice of the office; that no appeal lies to him inasmuch as the Assistant Commissioner performed the functions of the Commissioner in the premises, and that the relator has his remedy by appeal to the Court of Appeals of the District of Columbia. That the writ of *mandamus* does not lie to control the action of an executive officer of the Government where he is called upon to exercise discretion or judgment, and that the court will not interfere with such officer in the exercise of his ordinary official duties even where those duties require an interpretation of the law, is well settled.

Decatur *v.* Paulding, 14 Pet., 497.
Brashear *vs.* Mason, 6 How., 92.
U. S. Seaman, 17 How., 225.
Comm'r *v.* Whiteley, 4 Wall., 522.
Gaines *v.* Thompson, 7 Wall., 347.
Dunlap *v.* Black, 128 U. S., 40.

In the case of Decatur *v.* Paulding, the widow of Stephen Decatur applied for and received a pension under a general law, and later she demanded of the Secretary of the Navy an additional pension granted to her by resolution of Congress of the same date as the general law. The Secretary, acting upon the advice of the Attorney General, decided that she was not entitled to both, and she thereupon applied to the circuit court of the District of Columbia for a writ of *mandamus* to compel the Secretary to comply with her demand. The court denied the writ, and upon error to the Supreme Court, as remarked by Justice Bradley in Dunlap *v.* Black, "Chief Justice Taney delivered the opinion of the court and laid down the law in terms that have never been departed from." The Chief Justice said: "The head of an executive department of the Government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of the departments as well as for the President unless those duties were regarded as executive in which judgment and discretion were to be exercised. If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by a head of a department. And if they supposed his decision to be wrong, they would, of course, pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by *mandamus* act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties."

This decision is emphasized by Justice Miller in Gaines *v.* Thompson. Gaines filed a bill for injunction in this court to restrain the Secretary of the Interior and the Commissioner of the General Land Office from cancelling an entry. Speaking of the functions of executive officers of the Government, that learned jurist says: "Certain powers and duties are confided to those officers and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts after the matter has passed beyond their control, there exists no power in the courts by any of their processes to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion and not

in the court. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of *mandamus*.

These principles control this case. The respondent has acted in the performance of his duty in the premises upon his construction of the laws regulating his official action, and his discretion and judgment cannot be controlled by the courts directly by any of its processes.

It may be added that the writ of mandamus is not available where there is another adequate specific remedy, and that the relator has a well-recognized right of appeal to the Court of Appeals of this District from the decision of the Assistant Commissioner.

The rule is discharged and the petition is dismissed.

A. C. BRADLEY, *Justice.*

Nov. 24, 1900.

27 *Order for Appeal.*

Filed December 5, 1900.

In the Supreme Court of the District of Columbia, the 1st Day of December, 1900.

THE U. S. *ex Rel.* CHARLES W. STAPLETON
vs.
CHARLES H. DUELL, Commissioner of Patents. } At Law. No. 44246.

The clerk of said court will please note an appeal by the relator to the Court of Appeals of the District of Columbia from the judgment of November 24, 1900, denying the writ of mandamus and dismissing petition, and issue citation to respondent.

C. W. STAPLETON, *Relator.*

28 In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* Charles W. Stapleton
vs.
CHARLES H. DUELL, Commissioner of Patents. } At Law. No. 44246.

The President of the United States to Charles H. Duell, Commissioner of Patents, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 5th day of December, 1900, wherein The United States of America *ex rel.* Charles W. Stapleton is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 5th day of December, in the year of our Lord one thousand nine hundred (1900).

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 5 day of Dec., 1900.

W. A. MEGRATH,
Attorney for Appellee.

29 *Order Fixing Amount of Bond, &c.*

Filed —— —, —.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* Charles W. Stapleton
vs.
CHARLES H. DUELL, Commissioner of Patents.
} At Law. No. 44246.

The relator, having noted an appeal to the Court of Appeals of this District, comes here now and moves the court to fix the penalty of the bond on appeal, and it is considered that the penalty of such bond be, and hereby is, fixed at fifty dollars.

And further, upon motion of said relator, it is ordered that the fifty dollars deposited herein as security for costs be retained by the clerk in lieu of a bond on appeal.

A. C. BRADLEY, *Justice.*

30 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 29, inclusive, to be a true and correct transcript of the record as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 44246, at law, wherein The United States of America *ex rel.* Charles W. Stapleton is relator and Charles H. Duell, Commissioner of Patents, is respondent, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 24 day of December, A. D. 1900.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1041. The United States of America *ex rel.* Charles W. Stapleton, appellant, *vs.* Charles H. Duell, Commissioner of Patents. Court of Appeals, District of Columbia. Filed Dec. 28, 1900. Robert Willett, clerk.